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No. 90-291

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

MATTHEW GRUBER,

Petitioner,

v.

BOARD OF MEDICAL EXAMINERS
OF THE STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent rejects petitioner's statement of the questions presented, and submits the following in their place.

1. Where petitioner declined to seek available state court judicial review of respondent's order directing him to take a competency examination, and that order became final and unreviewable under state law, may petitioner challenge the constitutionality of the procedures leading up to that order after his license to practice medicine in Oregon was revoked, following a formal hearing, for wilful refusal to comply with the order to take the competency examination?
2. Did respondent's order directing petitioner to take a competency examination deprive petitioner of a liberty or property interest, thus requiring respondent to grant petitioner procedural protections under the Due Process Clause?

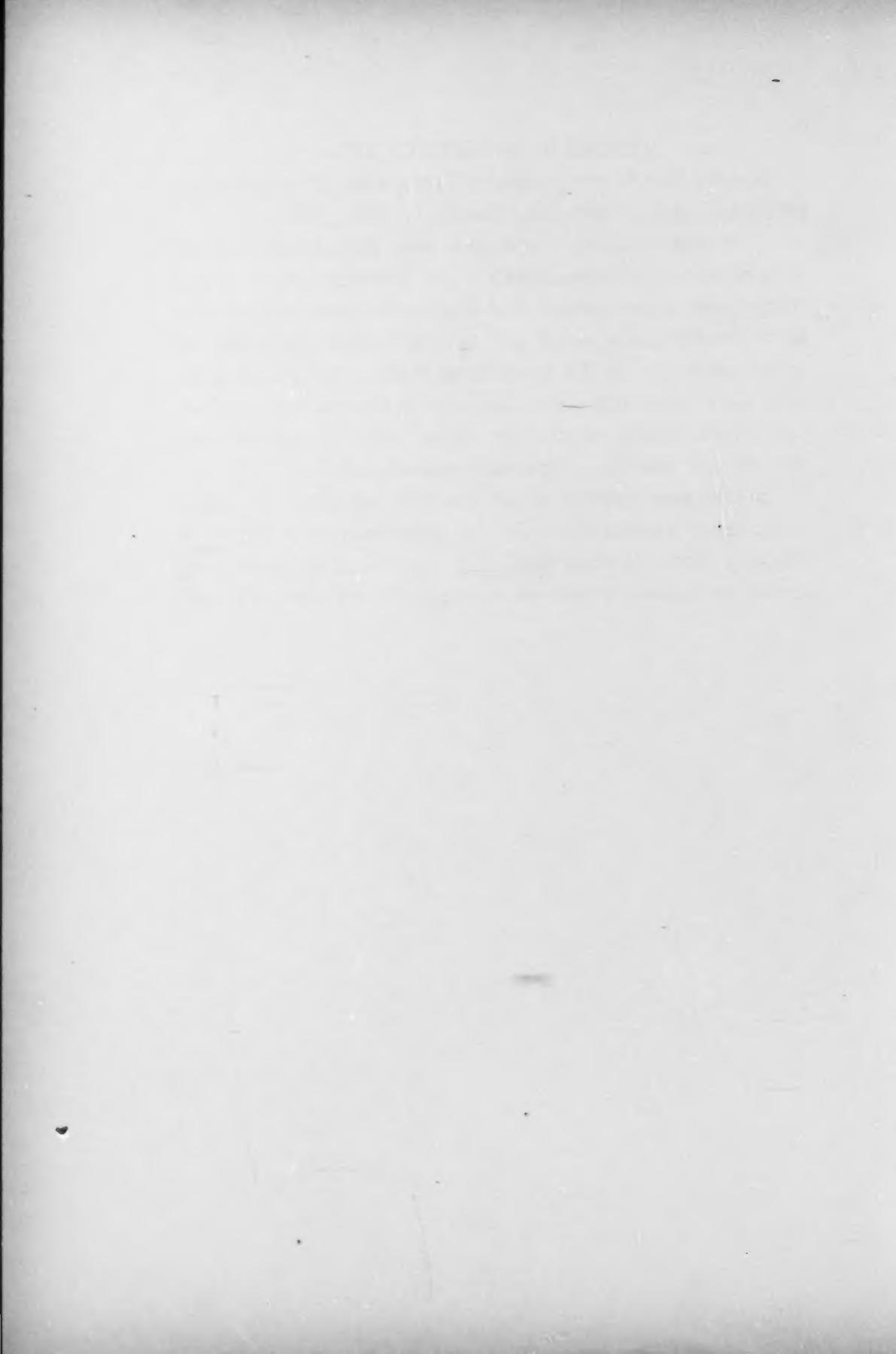


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OPINIONS BELOW

Respondent accepts petitioner's statement, except to point out that the Oregon appellate courts' actions in this case appear at *Gruber v. Board of Medical Examiners of the State of Oregon*, 98 Or. App. 55, 778 P.2d 516 (1989), review denied 309 Or. 334, 787 P.2d 888 (1990).

STATEMENT OF JURISDICTION

Respondent accepts petitioner's statement.

STATEMENT OF THE CASE

Respondent submits the following supplemental statement of the case.

Following the death of one of petitioner's patients in 1984, physicians at Salem Hospital, where petitioner had staff privileges, questioned petitioner's continued competency to practice medicine at the hospital. Tr. 6, 43, 49. The Salem Hospital medical board reviewed petitioner's medical practice and revoked petitioner's hospital privileges. Tr. 63.

Pursuant to the mandate of Or. Rev. Stat. §§ 441.820 and 677.415(2), Salem Hospital reported this action to respondent, the Board of Medical Examiners of the State of Oregon (hereinafter the Board). The Board then undertook an independent, informal investigation under Or. Rev. Stat. § 677.415(3) to determine whether there was a problem regarding petitioner's competency to practice medicine in Oregon. Tr. 22, 57.

An investigative subcommittee of the Board met with petitioner on October 1, 1986, to discuss several of the patient cases that were reviewed at Salem Hospital. Tr. 1-61. The full Board met with petitioner on October 10, 1986, for the same purpose. Tr. 62-84. These and all other meetings were recorded, and petitioner was allowed to bring an attorney. Tr. 1, 63, 86, 92. Petitioner has a law degree, but has not passed the bar exam. Tr. 142, 143.

After the first informal meetings, the Board randomly selected several of petitioner's patient records to be reviewed as part of the investigative process. Tr. 86. Petitioner was informed that the reviewer's name was confidential at that stage of the investigation, but would be provided to him if the reviewer's conclusions or report became the basis for taking disciplinary action. Tr. 95. After receiving the reviewer's report, the investigative committee (May 6, 1987) and the Board (July 8, 1987) met with petitioner again in an informal investigative capacity. Tr. 86, 91.

On August 10, 1987, the Board, finding reasonable cause to believe that petitioner may be unable to practice medicine with reasonable skill and safety to patients, ordered petitioner to take a FLEX competency examination. Ex. 1. That order was served on petitioner August 13, 1987. The examination was scheduled for December 1-3, 1987. Ex. 2. By letters of September 24, 1987 (Ex. 5) and November 17, 1987 (Ex. 7), petitioner informed the Board of his intent not to take the examination. Among the reasons he gave was his desire that the Board "convert" the matter to a contested case hearing. Tr. 139; Ex. 5, 7. The Board told petitioner that the competency exam as well as the interviews were part of the investigative process and did not constitute Board disciplinary action to revoke or otherwise affect petitioner's license. Tr. 2, 64, 86, 92; Ex. 4. For these reasons, the Board informed petitioner that the proceedings did not require a contested case hearing. Ex. 4.

The Board's order to take the competency examination was subject to judicial review under Or. Rev. Stat. § 183.484(1) as an "order[] [in] other than [a] contested case[]." The deadline for filing a petition for judicial review was October 12, 1987, 60 days after the date the order was served. Or. Rev. Stat. § 183.484(2). On September 24, 1987, petitioner notified the Board that his attorney would file the "appropriate

papers." Tr. 141; Ex. 5. However, neither petitioner nor his attorney filed a petition for judicial review.

Petitioner ultimately refused to take the examination. Consequently, the Board, acting pursuant to Or. Rev. Stat. § 677.420 and Or. Admin. R. 247-10-070, decided to take disciplinary action against the petitioner for his refusal to comply with the Board's order. On February 2, 1988, the Board informed petitioner of the grounds for the proposed disciplinary action, and the potential sanction. The Board's letter also informed petitioner of the date, time and place of the scheduled hearing on the matter, and was accompanied by a notice of the "Bill of Rights" under Oregon's Administrative Procedure Act. Ex. 201. A contested case hearing on that matter was held as scheduled on March 16, 1988, before an independent hearing officer. At this hearing, petitioner introduced transcripts of the informal interviews. Tr. 128, 129.

After this hearing, the hearing officer prepared his Proposed Findings of Fact, Conclusions of Law, Order and Opinion. The Board, reviewing the entire record and petitioner's written exceptions to the proposed order, adopted that proposed order in its entirety. The Board ruled, *inter alia*, that petitioner could not challenge the prior order to take a competency examination, because he failed to seek available judicial review of that order within the time set by Or. Rev. Stat. § 183.484. The Board also found that petitioner wilfully refused to comply with the Board's order. That refusal is a ground for revocation of a license to practice medicine in Oregon. Or. Rev. Stat. § 677.190(18). On that basis, the Board revoked petitioner's license to practice medicine in Oregon.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I. Petitioner's Challenges to the Procedures Underlying the Board's Order to Take the Competency Examination are not Properly Before this Court.

Petitioner has offered three questions for resolution by this Court. The first question concerns the procedures leading up to the Board's August 10, 1987, order to petitioner to take a competency examination. The second and third questions concern the Oregon statutes that empower the Board to order licensed physicians to take a medical competency examination. Petitioner contends that the Board denied him due process by ordering him to take a competency examination without first affording him a "due process hearing." He also argues that the Board has unconstitutionally interpreted its enabling statutes to permit it to order a physician to take a competency examination without first granting a hearing.

None of these questions is properly before this Court. As explained below, the Board's August 10, 1987, order to petitioner to take a competency examination was subject to judicial review in state court. When petitioner failed to seek judicial review before the filing deadline, that order became final and not open to collateral attack.

Under Oregon's Administrative Procedure Act (APA), Or. Rev. Stat. §§ 183.310 to 183.550, that order was an order in other than a contested case. Petitioner could have sought judicial review of that order by filing a petition for judicial review in the appropriate state circuit court within 60 days from the date the order was served: that is, by October 12, 1987. *See* Or. Rev. Stat. § 183.484(1), (2). On judicial review, the order would have been subject to attack on a wide variety of grounds: that the agency erroneously interpreted a provision of law and that a correct interpretation requires a particular action, Or. Rev. Stat. § 183.484(4)(a); that the agency's

exercise of discretion was outside of the range of discretion delegated to the agency by law, Or. Rev. Stat. § 183.484(4)(b); and that the order is not supported by substantial evidence in the record, Or. Rev. Stat. § 184.484(4)(c).

The record shows that petitioner and his attorney were aware of the appealability of the Board's order to take the competency examination. Yet petitioner failed to file a timely (or any) petition for judicial review of that order. When the 60-day filing deadline passed, that order became final and immune from collateral attack. *See, e.g., Ellis v. Roberts*, 302 Or. 6, 18, 725 P.2d 886 (1986) (right to challenge order in other than contested case expires after 60 days); *Clarke Electric, Inc. v. State Highway Division*, 93 Or. App. 693, 697, 763 P.2d 1199 (1988) (plaintiff's tort claim challenging state's award of contract to another bidder barred because the award was reviewable under Or. Rev. Stat. § 183.484 and plaintiff failed to comply with time limitations for judicial review); *Mongelli v. Oregon Life and Health Guaranty*, 85 Or. App. 518, 522, 737 P.2d 633 (1987) (Oregon APA statutes governing judicial review provide sole and exclusive methods of obtaining judicial review of orders covered by that Act). As noted above, it was on this ground that the Board, in the hearing on the revocation of petitioner's license, refused to consider petitioner's challenges to the Board's earlier order directing petitioner to take a competency examination. The Board's refusal was correct.

Petitioner also had an additional avenue for judicial review under state law. During the proceedings prior to the Board's issuance of its August 10, 1987, order, petitioner could have sought interlocutory judicial review under Or. Rev. Stat. § 183.480(3). This statute permits a person to obtain interlocutory judicial review of agency action

upon showing that the agency is proceeding without probable cause, or that the party will suffer substantial

and irreparable harm if interlocutory relief is not granted.

See, e.g., Lane Council Govts v. Emp. Assn., 277 Or. 631, 638, 561 P.2d 1012 (1977) (applying statute); *Mongelli v. Oregon Life and Health Guaranty*, *supra*, 85 Or. App. at 524-25 (same). Petitioner also passed up this method of obtaining judicial review.

Thus, petitioner's attack on the Board's order directing him to take a competency examination is barred under state law because of his failure to seek available judicial review of that order within the deadlines set by Oregon's APA. He has not suggested, nor could he reasonably suggest, that the 60-day time limit for filing a petition for judicial review was constitutionally insufficient.

Petitioner asserts, without support, that on judicial review under Or. Rev. Stat. § 183.484, the circuit court could not have resolved the matter before the time scheduled for the examination. Petition at 16 n. 5. Over three and one-half months elapsed between August 13, 1987 (the date the order was served) and December 1, 1987 (the date on which the test was scheduled to begin). There is not a shred of evidence in this record to suggest that, had petitioner filed a timely petition for judicial review, the circuit court could not have resolved the matter before the scheduled test. By his own inaction petitioner deprived himself of the chance to obtain judicial relief.

For these reasons, the issues petitioner seeks to raise in this Court are not properly presented in the current posture of this case.

II. Petitioner's Assertion that the Procedures Before the Board Violated Oregon Law does not Warrant this Court's Discretionary Review.

In part II of his petition, pages 22-25, petitioner argues that the Board, in failing to provide a "contested case" hearing before ordering petitioner to take a competency examination,

violated Oregon law. As explained above, petitioner is precluded from raising that issue under Oregon law because of his failure to seek judicial review of the order within the 60 days provided by Oregon's APA. In any event, even if petitioner were not so barred, that question of the interpretation and application of state law does not justify this Court's discretionary review.

Even if petitioner were correct in his analysis of Oregon law, that would not aid him here. Under Oregon law, the determination whether an administrative proceeding is a "contested case" requiring the APA's procedural protections depends not on the procedures actually followed by the agency, but on the procedures that should have been followed. *Patton v. St. Bd. Higher Ed.*, 293 Or. 363, 366, 647 P.2d 931 (1982). If petitioner were correct that the Board should have provided him a "contested case" before ordering him to take a competency examination, then the order was an order in a contested case. *See id.* A person seeking judicial review of an order in a contested case must file a petition for judicial review in the Oregon Court of Appeals within 60 days of the date the order was served. Or. Rev. Stat. § 183.482(1). Petitioner failed to do so. Accordingly, and for the reasons stated in Part I above, even under petitioner's theory he is barred under Oregon law from seeking judicial review of that order. The state law issue he seeks to raise in this Court, therefore, is not properly presented.

III. Petitioner's Due Process Claims do not Warrant this Court's Discretionary Review.

In part III of his petition, pages 26-34, petitioner contends that the Board, in failing to provide a hearing before ordering petitioner to take a competency examination, denied him due process. Petitioner merely argues that the Board's actions were inconsistent with settled principles established by this Court under the Due Process Clause. He fails to explain why,

even if his argument were accepted, the Oregon courts' resolution of this matter is of such significance that it merits this Court's discretionary review.

In particular, petitioner does not suggest that the type of problem he alleges is widespread and requires resolution by this Court. Respondent's research has uncovered only one other case involving the precise issue petitioner seeks to raise here: *Smith v. Board of Medical Quality Assurance*, 202 Cal. App.3d 316, 248 Cal. Rptr. 704 (1988). As explained below, in that case, the California Court of Appeals held that an order requiring a physician to take a competency examination did not deprive the physician of a liberty or property interest and, therefore, did not implicate the Due Process Clause. Thus, petitioner can point to no disagreement among different jurisdictions on an important federal question, or any other similar basis to justify this Court's special attention.

IV. The Board did not Deny Petitioner Due Process by Failing to Grant a Hearing before Ordering Petitioner to Take a Competency Examination.

Even if this Court were to reach the merits of the issues petitioner has raised, petitioner could not prevail. The Board's order directing petitioner to take a competency examination did not implicate the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution forbids the states from depriving any person of "life, liberty, or property" without due process. Here, petitioner argues that the Board's order deprived him of a property interest by placing his license to practice medicine in "serious jeopardy," Pet. Cert. at 32, thereby triggering due process protections. Petitioner is wrong.

Under Oregon law, the Board's order directing petitioner to take a competency examination was merely part of the Board's investigative process to determine petitioner's fitness to practice medicine:

If the board has reasonable cause to believe that any licensee is or may be unable to practice medicine . . . with reasonable skill and safety to patients, the board shall cause a competency examination of such licensee for purposes of determining the fitness of the licensee to practice medicine . . . with reasonable skill and safety to patients.

Or. Rev. Stat. § 677.420(2). Failing a competency examination ordered by the Board would have constituted “[m]anifest incapacity to practice medicine,” a ground for revoking petitioner’s license. Or. Rev. Stat. § 677.190(15). Nonetheless, the order to take the examination, by itself, did not affect petitioner’s license to practice medicine. Before the Board may revoke a physician’s license for failing a competency examination, the Board must afford the physician the opportunity for a hearing with all of the due process protections provided by Oregon’s APA. Or. Rev. Stat. § 677.208(1). Thus, the order to take a competency examination did not place petitioner’s license directly at stake, and therefore did not deprive petitioner of any property interest in that license.

Respondent has found only one reported case presenting this issue. In *Smith v. Board of Medical Quality Assurance*, 202 Cal. App.3d 316, 248 Cal. Rptr. 704 (1988), the California court rejected an argument identical to petitioner’s. That case arose under California’s statutory scheme governing medical licensing, which for present purposes is essentially identical to Oregon’s. In *Smith*, the physician argued that he was denied due process when ordered by the state board to take a medical competency examination. The court disagreed, stating in relevant part:

First, he contends that the Board’s action deprived him of the property interest represented by his license to practice medicine. Unquestionably, a physician has a vested property right in his or her medical license,

once acquired. However, in this case, the Board's proceedings and order do not jeopardize this property interest. The proceedings were conducted to determine whether there was reasonable cause to believe that Smith was an incompetent physician and resulted in an order compelling him to undergo an examination to establish this fact. It was not a disciplinary proceeding and Smith's license was not immediately at stake. Until a formal accusation is filed against a physician, his or her license is valid. Once an accusation is filed, the physician enjoys the protection of a full range of due process rights.

. . . Smith had no federal due process rights at stake at the reasonable cause proceeding.

Smith, 202 Cal. App.3d at 326-27 (citations omitted). The California court's reasoning is persuasive, and resolves the due process issue against petitioner.

Once the Board instituted proceedings to revoke petitioner's license, it held a contested case hearing under Oregon's APA, granting petitioner full due process protections. See Or. Rev. Stat. § 677.208(1); see generally Or. Rev. Stat. §§ 183.413 to 183.470 (APA provisions governing conduct of contested cases). Petitioner does not suggest that the hearing held by the Board was constitutionally deficient in any respect. Accordingly, petitioner has raised no colorable claim of a denial of due process.

CONCLUSION

Petitioner's proffered issues cannot be raised in this Court in this proceeding. Additionally, petitioner has failed to present any persuasive reason why this case is sufficiently important to merit this Court's review and resolution. Moreover,

his claims, when examined, lack merit. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,
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